WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
OCTOBER, 2013

The cases scheduled for oral argument on **Oct. 3, 2013** will be heard **at the Sheboygan County Courthouse** as part of the Wisconsin Supreme Court's Justice on Wheels program. The Sheboygan County Courthouse is located at 615 N. Sixth St., Sheboygan. Other cases will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Columbia
Dane
Kenosha
Milwaukee
Racine

THURSDAY, OCTOBER 3, 2013 [SHEBOYGAN]

9:45 a.m.	10AP3016-CR	-	State v. Nicolas Subdiaz-Osorio
11:15 a.m.	12AP336-CR	-	State v. Bobby L. Tate

TUESDAY, OCTOBER 15, 2013 [MADISON]

9:45 a.m.	12AP858	-	Vicki L. Blasing v. Zurich American Ins. Co., et al.
10:45 a.m.	12AP1426	-	State v. Brandon H. Bentdahl
1:30 p.m.	11AP2902	-	Board of Regents - UW System v. Jeffrey S. Decker

TUESDAY, OCTOBER 22, 2013 [MADISON]

9:45 a.m.	11AP2188	-	State ex rel. Ardonis Greer v. David H. Schwarz
10:45 a.m.	11AP2961-D	-	Office of Lawyer Regulation v. Randy J. Netzer
1:30 p.m.	11AP2905-CR	-	State v. Darryl J. Badzinski

WEDNESDAY, OCTOBER 23, 2013 [MADISON]

9:45 a.m.	11AP2608	-	Michael D. Phillips v. Daniel G. Parmelee
10:45 a.m.	12AP829	-	Ronald E. Belding, Jr. v. Deeanna L. Demoulin
1:30 p.m.	11AP1572	-	Julaine K. Appling, et al. v. Scott Walker, et al.

In addition to the cases listed above, the following cases are assigned for decision by the court on the last date of oral argument based upon the submission of briefs without oral argument:

2011AP2946-D - Office of Lawyer Regulation v. Suzanne M. Smith

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
THURSDAY, OCT. 3, 2013
9:45 a.m. (Sheboygan)

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Kenosha County Circuit Court decision, Judge Mary K. Wagner, presiding.

2010AP3016-CR State v. Subdiaz-Osorio

This reckless homicide case examines two constitutional issues. One issue is whether police, without obtaining a warrant, can legally use the global position system (GPS) signal of a personal smartphone to track a suspect in real-time. The other issue concerns the admissibility of defendant Nicolas Subdiaz-Osorio's statements obtained during his custodial interrogation after he made the following statement: "How can I do [sic] to get an attorney here because I don't have enough to afford one?" Subdiaz-Osorio contends the trial court erred by denying his motion to suppress certain evidence related to these issues. Without deciding the constitutional questions, the Court of Appeals determined any error was harmless.

Some background: On Feb. 8, 2009, police found Subdiaz-Osorio's brother, Marcos, deceased in a bedroom in the trailer Marcos shared with Subdiaz-Osorio in Kenosha County. Marcos had been battered and stabbed. An autopsy determined that Marcos died of a stab wound to the head.

An eyewitness, Lanita Mintz, saw Subdiaz-Osorio argue with Marcos in Subdiaz-Osorio's bedroom on Feb. 7, 2009. Marcos hit Subdiaz-Osorio in the mouth, pushing in his front teeth and knocking him backwards. Subdiaz-Osorio then retrieved two knives from the closet and stabbed Marcos with both knives, once in the chest and once under the eye. After Marcos fell to the floor, Subdiaz-Osorio kicked and punched him repeatedly, ignoring Mintz's pleas to stop.

The next morning, Marcos was found dead. Subdiaz-Osorio's girlfriend contacted the police and reported that Subdiaz-Osorio had stabbed Marcos. She also told police that Subdiaz-Osorio had fled in her silver Saturn station wagon and might possibly be heading to Mexico because he had family there. The girlfriend gave police the license plate number and title for her car and Subdiaz-Osorio's cell phone number.

Early on the afternoon of Feb. 8, 2009, police sent out a national bulletin to apprehend Subdiaz-Osorio on both the state's Crime Information Bureau and the National Crime Information Center Internet networks. That same day, an agent from the Wisconsin Department of Justice, Division of Criminal Investigation requested call record details and GPS location information from Subdiaz-Osorio's cell phone provider. After having the agent fill out forms for such a request, the cell phone provider agreed to provide the requested information.

Police used the information to track Subdiaz-Osorio down on Interstate 55 in Arkansas, where he was taken into custody. Two detectives and one officer from Kenosha County travelled to Arkansas and interviewed Subdiaz-Osorio in jail. The officer read Subdiaz-Osorio the Miranda warnings [Miranda v. Arizona, 384 U.S. 436 (1966)] and waiver in Spanish and provided Subdiaz-Osorio with the card bearing the Spanish translation of those warnings for him to read along.

Subdiaz-Osorio and the officer signed and dated the waiver form. After Subdiaz-Osorio agreed to be interviewed both orally and in writing, police engaged him in an audio and video recorded interview that lasted less than an hour. Subdiaz-Osorio agreed to speak without an attorney present. Police removed Subdiaz-Osorio's handcuffs and gave him a soda. Subdiaz-Osorio asked the officer whether they would be taking him back to Kenosha. The officer answered that he would first have to appear before a judge in Arkansas who would make that determination. Subdiaz-Osorio asked: "How can I do [sic] to get an attorney here because I don't have enough to afford for one?" The officer said the state of Arkansas would appoint a lawyer for the hearing. The interview then continued and Subdiaz-Osorio confessed within the hour.

The state charged Subdiaz-Osorio with first-degree intentional homicide; he later pled guilty to first-degree reckless homicide.

Subdiaz-Osorio moved to suppress certain information based upon: (1) the alleged illegal "search" of his cell phone that resulted in his arrest and the subsequent inculpatory statements in Arkansas; and (2) an alleged Miranda violation preceding his confession.

WISCONSIN SUPREME COURT
THURSDAY, OCTOBER 3, 2013
11:15 a.m. (SHEBOYGAN)

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl, presiding.

2012AP336-CR State v. Tate

In this case, the Supreme Court examines whether obtaining a cell phone's location constitutes a "search" within the meaning of the Fourth Amendment, and if so, what probable cause standard applies before police can obtain location information. The Supreme Court also reviews whether statutory authorization is necessary before a court can permit this kind of search, and whether such statutory authorization exists.

Some background: Bobby Tate was convicted, based on his no contest plea, of first-degree reckless homicide and possession of a firearm by a felon. The Court of Appeals affirmed a circuit court order denying Tate's motion to suppress evidence obtained as a result of location data that the police were able to obtain from the cellular telephone company pursuant to a court order.

Here's what led to the charges: Witnesses observed a shooting outside of the Mother's Food Market, Magic Cell Phones store on North 16th Street in Milwaukee during the evening of June 9, 2009. Witness indicated that they observed an unknown black male wearing a white shirt with large, colored stripes shoot two individuals, one of whom died.

The police viewed interior and exterior surveillance video, which showed a man wearing a white shirt with stripes purchase a cell phone inside the store and then several minutes later fire several shots in front of the store. The purchaser identified himself to the store clerk as "Bobby."

The police obtained the phone number of the cell phone purchased by the man in the white, striped shirt and submitted an "Application for Orders" along with a supporting affidavit from a police detective. The affidavit included a statement that the detective believed that locating the cell phone would "reveal evidence of the crime of First Degree Intentional Homicide. A judge issued an order that, among other things, authorized police to obtain data and information from the cellular telephone company that would allow them to track the phone's physical location. The order cited Wisconsin's search warrant statute (Wis. Stat. § 968.35) and a number of federal statutes (18 U.S.C. §§ 2703(c)(1)(B) & (d), 2711(3), 3117, 3127(2)(B), and 3125).

Using the cell tower activity information and other location information, plus their own equipment, the police were able to track the location of the specific cell phone to a particular area of an apartment building in Milwaukee.

A number of officers then went into the building and began knocking on apartment doors, asking for permission to search. One apartment door on which they knocked belonged to Tate's mother.

Tate was staying at his mother's apartment at the time. The officers asked if they could search her apartment, and Tate's mother consented. The officers entered the apartment and went to a back bedroom, where they found Tate sleeping. In the bedroom, the officers also observed a pair of pants, a white shirt with multi-colored stripes similar to that observed on the surveillance

videos, and a pair of tennis shoes, one of which appeared to have blood on it. The blood was later tested and was found to contain the DNA of one of the victims of the shooting.

The police arrested Tate. He filed a motion to suppress all evidence that was discovered and seized pursuant to or as a result of the court-ordered tracking of his cell phone. The circuit court denied the motion to suppress. Tate appealed.

The Court of Appeals boiled its analysis down as follows: "The only issue relevant to this appeal is whether there was probable cause to believe that location data obtained from Tate's phone would lead to evidence of the crime of homicide described by witnesses and shown on the surveillance videos."

The Court of Appeals concluded that the facts presented in the affidavit, in total, were sufficient to support the issuing judge's belief that the location data for the phone "would probably lead to evidence of the shooting, Tate's clothing, the weapon, and ultimately, Tate himself."

The U.S. Supreme Court and this court held that attaching a global positioning system (GPS) device to a vehicle is a search, but there has not been a decision whether obtaining location data from a cellular service provider is a search. See United States v. Jones, ___ U.S. ___, 132 S. Ct. 945 (2012) (affirming Court of Appeals' reversal of a conviction due to a warrantless GPS search); State v. Sveum, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317.

Among other things, Tate argues that obtaining location data and using that data to find the location of a cell phone constitutes a search, that there is no statutory basis to support the order issued by the trial judge, and that there was not the type of probable cause that should be required for the type of order issued here.

The state contends that, under the Wisconsin Supreme Court's decision in Sveum no statutory authority is needed for the kind of tracking order at issue in this case. Alternatively, it argued that several statutes do provide authority for this kind of order. The state's says concerns in other cases have generally focused on the warrantless use of cell phone tracking information by law enforcement. Since the police here obtained a court order or warrant supported by probable cause, the state believes the search was permissible.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 15, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Jefferson County Circuit Court decision, Judge William F. Hue, presiding.

2012AP858 Blasing v. Zurich American Ins. Co.

This insurance case involving alleged negligence by a store employee examines whether the omnibus statute, Wis. Stat. § 632.32(3)(a), requires a liability insurer to defend and indemnify a tortfeasor where the alleged negligence causes injury to the named insured person.

Some background: Vicki L. Blasing bought lumber from a Menards store. She drove her pickup truck to the Menards' lumber yard, where a Menards employee used a forklift to load the lumber. During the loading process, a piece of lumber fell from the forklift, injuring Blasing's foot.

Blasing sued Menards for her injury, alleging that the Menards employee had been negligent. Two insurance policies were in place at the time of the accident. Blasing had an auto insurance policy with American Family; Menards carried a commercial general liability (CGL) policy through Zurich American.

Menards argued that Blasing's American Family auto insurance policy should have to defend it. American Family countered by arguing that it would be an unreasonable outcome for American Family to have to defend the negligent Menards' employee and potentially pay for Blasing's injury when Menards has its own CGL policy.

The trial court ruled in favor of American Family. The Court of Appeals reversed, ruling that American Family must defend Menards and indemnify it against any loss. During the appellate proceedings, the parties agreed that it made sense to resolve their dispute by interpreting the omnibus statute, Wis. Stat. § 632.32, because if that statute requires that the American Family policy provide coverage for Menards under the circumstances of this case, then American Family must provide coverage regardless of the particular language in its policy. See Frye v. Theige, 253 Wis. 596, 600-01, 34 N.W.2d 793 (1948) ("[I]f what is stated in the policy to be a general exclusion of coverage in fact denies to an additional assured the same protection that is given to the named assured neither its form nor its location in the policy will save it or give it validity."). The omnibus statute requires that automobile insurance policies provide additional vehicle users "the same protection as is afforded to the named insured." See Carrell v. Wolken, 173 Wis. 2d 426, 436-37, 496 N.W.2d 651 (Ct. App. 1992).

The Court of Appeals held that because the policyholder, Blasing, would have been using her truck if she had been engaged in the loading activity at Menards, and because it is undisputed that the Menards employee was acting with Blasing's permission to load Blasing's truck, the omnibus statute requires coverage for Menards under Blasing's American Family automobile policy.

American Family objects to this outcome. It argues that it is unreasonable to require that an injured person's insurance policy be used to defend and possibly indemnify a tortfeasor when the tortfeasor has insurance that would otherwise provide sufficient coverage. It argues that neither a reasonable insured nor a reasonable insurer would ever expect that a party like Menards could invoke a

policyholder's liability coverage against the policyholder. It further argues that if the court of appeals is right, then "every business that assists a policyholder in placing purchases in a policyholder's vehicle will have free liability insurance, courtesy of the injured policyholders themselves, for injuries arising out of the tortfeasor's negligence."

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 15, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed in part and remanded in part a Columbia County Circuit Court decision, Judge Aland J. White, presiding.

2012AP1426 State v. Bentdahl

The central question raised in this operating while intoxicated (OWI) case is whether a trial court has the discretion under State v. Brooks, 113 Wis. 2d 347, 335 N.W.2d 354 (1983), to dismiss a refusal charge after a defendant goes to trial on the OWI charge.

Specifically, the Supreme Court considers:

- Does Brooks, which held that a trial court has discretion to dismiss a refusal charge after a defendant pleads guilty to a charge of OWI, also apply when the defendant goes to trial on the OWI charge?
- Does this court's opinion in Brooks apply under current law to allow trial courts to dismiss refusal charges under their discretionary authority?

Some background: Brandon H. Bentdahl was arrested for OWI on Nov. 17, 2010 in Columbia County. The officer read to Bentdahl the required informing statement under § 343.305(4), which included the following: "If you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties." § 343.305(4).

The officer asked Bentdahl if he would submit to a blood test. Bentdahl said no. The officer took Bentdahl to the hospital where a blood sample was drawn. The officer then gave Bentdahl a notice of intent to revoke operating privilege as required by § 343.305(9). The notice included the following statement: "You have 10 days from the date of this notice to file a request for a hearing on the revocation with the court named below [referring to the Columbia County circuit court]. . . . If you do not request a hearing, the court must revoke your operating privileges 30 days from the date of this notice."

Bentdahl did not request a hearing. On Dec. 17, 2010, proceeding under § 343.305(10), the trial court entered a judgment convicting Bentdahl of refusing to take a test for intoxication. The trial court revoked Bentdahl's driver's license for two years and ordered that he complete an alcohol assessment and equip his vehicle with an ignition interlock for two years. In addition, the court ordered lifetime disqualification of Bentdahl's commercial driver's license due to the refusal conviction being a second alcohol conviction within five years.

In January 2011, Bentdahl's attorney met with the prosecutor and argued that the manner in which the officer dated the "Notice of Intent to Revoke" form was so confusing that Bentdahl could not have understood what his deadline was to request a hearing. The prosecutor agreed to a vacation of the refusal conviction and a stay of the order for revocation of Bentdahl's driver's license pending a future hearing.

The underlying OWI charge went to a jury trial. The state presented the blood test evidence and did not offer any evidence that Bentdahl initially refused to submit to the blood

test. The jury acquitted Bentdahl of OWI and the companion charge of operating with a prohibited alcohol concentration.

Bentdahl moved to dismiss the refusal charge, arguing that the notice was defective on account of the confusing date and therefore failed to provide the notice required by the statute. The trial court found the defect of the confusing date to be "fundamental to the purpose of the statute therefore depriving the court of jurisdiction" and granted the motion to dismiss the refusal charge.

The state appealed, and the Court of Appeals reversed the trial court order granting Bentdahl's motion to dismiss the refusal charge. The Court of Appeals held in part that under Brooks, the trial court has the discretionary authority to dismiss a refusal charge at a hearing after a guilty plea or after a trial, "with the outcome of the trial being just one factor for the court to consider." Thus, the Court of Appeals remanded the matter to the trial court "for its exercise of discretion based on the facts before it."

The state argues that if the Court of Appeals is correct, such that trial courts have discretion under Brooks to dismiss refusal charges for defendants who do not plead guilty to OWI, then there is nothing for defendants to gain by submitting to chemical testing. The state also argues that Brooks is not compatible with the current version of the implied consent statute because the statute provides no discretion to determine whether to hold a hearing, or whether to revoke a person's operating privilege.

A decision by the Supreme Court is expected to clarify a trial court's discretion to dismiss a refusal charge.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 15, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Dane County Circuit Court decision, Judge John W. Markson, presiding.

2011AP2902 UW System Board of Regents v. Decker

This case examines whether the UW System Board of Regents is eligible to obtain a harassment injunction against a former UW-Stevens Point student who has been lawfully banned from system property yet repeatedly trespasses and engages in a pattern of harassing and intimidating conduct.

Some background: The Board of Regents filed a petition for a temporary restraining order and harassment injunction against Jeffrey S. Decker in October of 2011. The Board of Regents alleged that during various meetings with the UW-Stevens Point chancellor, Decker "became agitated, began raising his voice and ranting and raving about UW SP employees in a derogatory manner," "threatened to 'fuck up' the chancellor's upcoming state of the university address and donor function," tried to grab at documents located on the chancellor's conference table, and forcibly stabbed the documents with a pen.

Decker was suspended from UW-Stevens Point from Nov. 19, 2010 through Jan. 1, 2012. Contrary to the terms of his suspension and Wis. Admin Code § UWS 17.17(4)(Aug. 2009), Decker trespassed on the UW-Oshkosh campus and distributed written materials at an intercollegiate basketball game. The Board of Regents alleged that on Sept. 1, 2011, Decker trespassed into a non-public meeting held at the UW-Fox Valley campus where he was disruptive, refused to leave, and was forcibly removed by police officers.

The Board of Regents alleged that on Sept. 8, 2011, Decker trespassed into a meeting of the Board of Regents held in Madison, videotaped and photographed the meeting, blocked the views of other members of the public, and refused to leave. Decker was placed under arrest, at which point he went limp, forcing officers to carry or drag him away and he "attempted to hook his feet onto the legs of chairs in an attempt to resist and obstruct the officers."

The Board of Regents also alleged that on Sept. 19, 2011, Decker trespassed into a meeting of the UW-Fox Valley Board of Trustees where he "repeatedly refused" to leave and became "belligerent and disruptive." When police officers tried to remove him from the meeting, Decker went limp, forcing officers to drag him out. Decker later returned to the campus but left before police could be contacted.

Following an Oct. 24, 2011 hearing, the circuit court entered an injunction against Decker effective until Oct. 24, 2015. The circuit court found that the requirements for the issuance of a harassment injunction had been met. It noted that § 813.125(1) and case law interpreting it established that one of the elements is engaging in a course of conduct or repeatedly committing acts that harass or intimidate another person and which serve no legitimate purpose.

Decker appealed, and the Court of Appeals reversed the circuit court's entry of a harassment injunction.

The Court of Appeals agreed with Decker that the record did not support a determination that his conduct lacked a legitimate purpose. The Court of Appeals said the record showed that

Decker believes that segregated fees charged to students by UW-Stevens Point and UW-Stevens Point's usage of those fees is not legal and that he has engaged in public protect activities relating to those issues since at least 2010.

The Court of Appeals said the record also showed that the conduct at issue here, including Decker's presence at the September 2011 meetings, was related to his public protest of those issues as well as a protest of what Decker perceives to be illegal or unauthorized actions by UW-Stevens Point administrators toward UW-Stevens Point students and him.

Because the legitimate protest of government policies is protected by law, the court concluded the record does not support the circuit court's finding that Decker's actions lacked a legitimate purpose. For that reason it reversed the circuit court's entry of the harassment injunction.

The Board of Regents argues that this case is about "the convergence of an individual's purported right to protest and the state's ability to protect its institutions and citizens against potentially dangerous individuals." The Board of Regents argues that the Court of Appeals' decision effectively holds that if a person is engaging in public protest, he cannot be subject to a harassment restraining order, even if he has repeatedly violated the terms of a validly imposed suspension, and even if his actions suggest a frightening disregard for the safety of others.

The Board of Regents also argues it is not the Court of Appeals' function to determine the facts, contending rather that Bachowski v. Salamone, 139 Wis. 2d 397, 408, 407 N.W.2d 533 (1987) explained that the purpose behind the respondent's acts and conduct is a determination that must of necessity be left to the fact finder, taking into account all facts and circumstances of the case.

The Board of Regents goes on to argue even if Decker had been engaging in actual protests while on the Board of Regent's property, because of his suspension it is undeniable his presence on the premises was unlawful and therefore was not protected or permitted by law.

Decker argues the Court of Appeals got it right. Among other things, he contends that protest does not lose its legitimacy simply because it is offensive or is perceived as "coercive" toward a desired change in policy. He argues that his purpose to provoke public discussion of UW administrators' actions that he deemed corrupt was legitimate under this standard.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 22, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Racine County Circuit Court decision, Judge Charles H. Constantine, presiding.

2011AP2188 Greer v. Schwarz

The central question presented in this case is whether the state Department of Corrections (DOC) can pursue revocation proceedings against an individual for an action committed after he received an erroneously issued discharge certificate.

Some background: Ardonis Greer was charged in Racine County Circuit Court with three counts and was convicted on two counts: possession with intent to deliver THC (count 1) and possession of a firearm by a felon (count 3). Count 2 was dismissed and read in for sentencing purposes.

On March 14, 2005, Greer was sentenced on count 1 to three years in the Wisconsin Prison System bifurcated as 14 months of initial confinement followed by 22 months of extended supervision. On count 3, Greer was sentenced to a bifurcated six-year term of imprisonment; the sentence was stayed and Greer was instead ordered to serve three years of probation "[c]onsecutive to count 1."

However, DOC failed to enter into its computer record system the court's order related to Greer's three-year consecutive probation term. Greer successfully completed his initial confinement and extended supervision committing no major violations, living with his mother, attending school, and working.

The DOC agent supervising Greer informed Greer that his supervision would be completed when his period of extended supervision expired on Sept. 28, 2007. Greer then received a discharge certificate from the DOC indicating he satisfied his sentence and was "discharged absolutely." The certificate also informed Greer that his right to vote and obligation for jury duty were restored.

On Nov. 5, 2009, Greer was involved in an argument resulting in criminal charges. (*See* Racine County Case No. 2009CF1478). Greer remained out of custody while these new charges were pending. He later entered a no contest plea to Intimidation Witness/Threat of Force due to his use of an "airsoft pistol toy gun" to threaten a witness during the incident. When Greer reported for a Presentence Investigation Interview on Sept. 1, 2010, the probation agent discovered the unrecorded three-year consecutive probation. On Sept. 2, 2010, Greer was told to report to the DOC office. Upon his arrival, Greer was immediately taken into custody on a DOC hold at the Racine County jail.

The DOC initiated revocation proceedings. Greer filed a written motion objecting to the DOC's jurisdiction on several grounds, notably his discharge certificate. Greer reiterated his jurisdictional objections at the revocation hearing.

Following the hearing, the administrative law judge ordered Greer's probation revoked, finding that Greer had threatened a witness (the Nov. 2009 charge) and had consumed alcohol. Other allegations (that Greer failed to report for consecutive probation, that he possessed a

firearm, and that he operated a motor vehicle in excess of posted speed limits) were deemed not proven. The administrator of the Division of Hearings and Appeals upheld this decision.

Greer filed a Writ of Certiorari in Racine County Circuit Court, which ruled that the Division was equitably estopped from revoking Greer. The administrator appealed, and the Court of Appeals, in turn, reversed, noting, "we find no authority, and counsel at oral argument was unable to cite to any, that says that courts sit in equity in certiorari actions."

The Court of Appeals focused on the plain language of the statute, which states that "[a]n individual who is placed on probation for a felony shall be discharged from probation and issued a discharge certificate from the DOC *when the period of probation for [the] probationer has expired.*" Wis. Stat. § 973.09(5) (emphasis added). The Court of Appeals ruled that the certificate to Greer was issued prematurely and in error and thus the DOC retained jurisdiction to pursue revocation.

Greer maintains that the Division is legally barred from revoking his probation because the DOC had issued a certificate discharging him from supervision. Greer argues that Wisconsin case law supports his assertion that a discharge certificate divests the court of jurisdiction or, alternatively, equitably estops the DOC from pursuing revocation. Greer points to the consequences of deeming the certificate invalid, such that it did not operate to terminate jurisdiction or actually reinstate Greer's civil rights.

The state contends that even if equitable relief was theoretically available in certiorari review, Greer could not establish in this case one of the essential elements of equitable estoppel, reasonable reliance. The state emphasizes the only basis for revocation upon which the administrator relied was Greer's new criminal conduct.

A decision by the Supreme Court is expected to clarify whether a circuit court, "sitting in certiorari has the authority to apply equitable estoppel...." The circuit court and Court of Appeals reached different conclusions on this question.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 22, 2013
10:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is from Onalaska.

2011AP2961-D OLR v. Randy J. Netzer

In this case, Atty. Randy Netzer has appealed a referee's findings and recommendation that his license to practice law in Wisconsin be suspended for 90 days. The referee found that the OLR met its burden of proof on counts of professional misconduct.

Some background: Netzer has been licensed to practice law in Wisconsin since 1984. He says he has not practiced law to earn a living since 1987. His state bar membership remains active. In 2006, Netzer was privately reprimanded for committing a criminal act that reflects adversely on his trustworthiness or fitness as a lawyer in other respects. In 2001, Netzer had been convicted of one count of stalking and one count of violating a harassment injunction that precluded Netzer from having any contact with a woman with whom he had had a relationship.

In 2010, Netzer was charged with one count of felony stalking – previous conviction, and two misdemeanor counts of violating a harassment injunction involving another former girlfriend, C.M.

In September 2009, after an approximately 14-month relationship, C.M. sent Netzer an email saying, "It is over." She told Netzer not to contact her in any way and not to send gifts, flowers, or attempt to talk to her in person. Netzer wrote C.M. an email saying he wanted to speak to her in person one more time. A week later he sent her a postcard from New York. C.M. rejected Netzer's further attempts at contact.

In October 2009 C.M. went to the LaCrosse Police Department and filed a complaint about Netzer stalking her. C.M. told police she had made drastic lifestyle changes because of Netzer's failure to comply with her demand to stay away from her. She said she had told her employer about her concerns about Netzer and the employer had set up surveillance cameras around her workplace. A LaCrosse police officer called Netzer, advised him about C.M.'s complaint, and said if Netzer's conduct continued, stalking charges would be filed. Netzer acknowledged it was wrong to stalk someone and promised not to stalk C.M.

A week later, Onalaska police responded to a call about a vehicle registered to Netzer parked on a road in proximity to C.M.'s condominium. Police located Netzer running in the vicinity and arrested him. A harassment injunction was issued against Netzer. He was ordered to have no contact of any kind with C.M.

WISCONSIN SUPREME COURT
TUESDAY, OCTOBER 22, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Dennis R. Cimpl, presiding.

2011AP2905-CR State v. Badzinski

This case examines whether a defendant in a child sexual assault case was deprived of his right to a unanimous verdict of guilt beyond a reasonable doubt. The question arose when the trial court answered "no" to the deliberating jury's question whether jurors had to agree on the room in which a sexual assault allegedly occurred.

Some background: In April 2006, a 15-year-old girl reported to police that she had a past history of sexual abuse but did not provide any detail. In August 2009, the girl told her mother that when she was between the ages of four and six years old, Darryl J. Badzinski once showed her his penis and made her touch it. The girl reported those details to the police eight weeks after telling her mother.

In October 2009, the state filed a criminal complaint against Badzinski, charging him with first-degree sexual assault of a child under 13 years of age. The complaint alleged that Badzinski had sexual contact with the girl "when she [was] approximately five or six years old, either at Christmas or at Easter time, during that time period, which would be from approximately Oct. 2, 1995 through April 30, 1998" at the girl's grandparents' house.

Prior to trial, Badzinski had filed a motion to dismiss the complaint on the grounds that it failed to state with sufficient particularity the date of the sexual assault and failed to give him adequate notice of the charge against him. The trial court said that it interpreted the complaint to set forth six specific dates: Christmas of 1995, 1996, and 1997, and Easter of 1996, 1997, and 1998. Trial defense counsel agreed that he could prepare a defense for those six specific dates, as long as the court assured him that at trial the state would be limited to arguing that the offense occurred on one of those dates. The court then instructed the state to amend the information accordingly, which it did.

At trial, the girl testified that the assault occurred when she was between four and six years old, on either Christmas or Easter, in a basement laundry room at her grandparents' house. At trial, Badzinski denied all of the girl's accusations. Multiple family members testified at trial on Badzinski's behalf.

During deliberations, the jurors submitted a question to the trial court asking whether they must agree on the "place" that the sexual assault occurred. The parties agreed that the trial court would send back a note indicating that the jurors must all agree that the assault occurred at the grandparents' home address. The jurors then submitted an additional question asking whether they had to agree on which room the assault occurred in. Over the defense's objection, the trial court simply answered, "[N]o."

The jury found Badzinski guilty. Badzinski filed a post-conviction motion that raised five issues, including that the trial court's answer to the jury question resulted in a denial of his right to a unanimous verdict. The trial court denied Badzinski's postconviction motion.

Badzinski appealed. A divided Court of Appeals reversed Badzinski's conviction and remanded for a new trial. A majority of the court concluded that the trial court erred when it answered the jury's question. The majority also concluded that Badzinski was entitled to a new trial.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 23, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Timothy M. Witkowiak, presiding.

2011AP2608 Phillips v. Parmelee

This insurance case examines whether the language of an asbestos exclusion in a business owner's commercial liability policy should be read to deny coverage essentially whenever the claim against the insured is based on the presence of asbestos.

Some background: Daniel G. Parmelee, through his limited liability company, Aquila LLC, (collectively, Parmelee) purchased an apartment building in New London in April 2006. One month before, Parmelee hired a building inspector, who inspected the property and issued a written report. The report stated that there were various defects in the building. It explicitly mentioned the likelihood of asbestos.

Parmelee went through with the purchase of the building and did not pursue testing or mitigation of the possible asbestos in the building. After several months, Parmelee asserts that he realized he did not have the necessary time to devote to managing the building and consequently put it back on the market. During the time Parmelee owned the building, it was insured under a policy issued to Aquila by American Family Mutual Insurance Co.

Michael D. Phillips contacted Parmelee by phone about the building and met with him the same day – Sept. 14, 2006. Before Phillips arrived for the meeting, Parmelee downloaded a real estate condition form and quickly filled it out. Parmelee claims that, given the limited time he had to fill out the form, he did not recall the potential presence of asbestos. He therefore did not check the box on the condition form indicating he was "aware of the presence of asbestos or asbestos-containing materials on the premises." He also did not check the box indicating that he was "aware of a defect caused by unsafe concentrations of . . . other potentially hazardous or toxic substances on the premises."

Phillips and Parmelee met again the next day to discuss details of the purchase and to allow Phillips to review a file that Parmelee maintained for the building. Parmelee claims that the file contained a copy of the March 2006 inspection report, but Phillips contends the report was never provided to him prior to the closing on the purchase for $419,000 on Sept. 27, 2006. In the offer to purchase, Parmelee represented that "as of the date of acceptance [he had] no notice or knowledge of conditions affecting the Property."

After buying the building, Phillips hired a contractor to convert the heating system from steam to hot water heat. The contractor cut up and removed some of the steam pipes and pipe wrap between July and September 2007, creating and spreading dust containing asbestos throughout the building.

Phillips states that he did not initially know about the presence of asbestos in the pipe wrap but learned of it after a contractor began removing pipes. According to American Family, which intervened in the subsequent lawsuit between Parmelee and Phillips, approximately three months passed between the time that Phillips learned of the presence of asbestos and it was

confirmed by professional testing. In the meantime, removal of the pipes and the asbestos-containing pipe wrap continued.

After an anonymous tip and inspections by the state Department of Natural Resources and the U.S. Environmental Protection Agency in December 2007, the Waupaca Department of Health and Human Services (Waupaca DHHS) issued an order to abate the asbestos hazard by February 19, 2008. The New London Building and Fire Inspector then declared the building unfit for human habitation and informed Phillips that it could not be used for any purpose until cleared by the Waupaca DHHS. Without rent-paying tenants, Phillips was unable to make mortgage payments and the lender foreclosed on the property. Phillips further asserts that, as a result of the problems with this building, he lost other buildings to foreclosure as well.

In November 2010, Phillips sued Parmelee in Milwaukee County Circuit Court based on the allegations that Parmelee made misrepresentations in the property condition report and offer to purchase and failed to disclose the presence of asbestos. Phillips sought to recover lost profits and lost equity in the subject building and other buildings.

In March 2011, American Family moved to bifurcate the insurance and liability/damage issues and subsequently filed a motion for declaratory/summary judgment. American Family argued that there was no coverage under the grant of coverage and that, even if covered by the initial grant of coverage, Phillips' claims were subject to several exclusions in American Family's policy.

The circuit court concluded that while Phillips' negligence claim was within the policy's initial grant of coverage, coverage was excluded by the asbestos exclusion in the policy. The court granted summary judgment on both coverage and duty to defend to American Family.

In affirming the trial court, the Court of Appeals agreed both that there was an initial grant of coverage and that coverage was ultimately excluded by the asbestos exclusion. It therefore did not reach a number of other arguments against coverage that were made by American Family.

This case will provide the Supreme Court with an initial opportunity to interpret an asbestos exclusion in a commercial general liability insurance policy, as well as possibly to address other insurance policy provisions.

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 23, 2013
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Kenosha County Circuit Court decision, Judge S. Michael Wilk, presiding.

2012AP829 Belding v. Demoulin

This insurance "stacking" case stems from an auto accident involving an uninsured drunken driver. A decision could resolve apparent tension between statutes regulating insurance coverage and affect more than a dozen pending cases and other cases still being filed.

The Supreme Court examines three issues:

- May Wis. Stat. § 632.32(5)(e) be used to prohibit an insurance provision expressly authorized by another subsection of Wis. Stat. § 632.32(5)?
- May a statute, unambiguous on its face, be rewritten by the court based upon a perceived conflict with another statute?
- Should Wis. Stat. § 632.32(6)(d) be construed to prohibit the "drive other car" exclusion expressly authorized by Wis. Stat. § 632.32(5)(j)?

Some background: "Stacking" is defined as the process of obtaining benefits from a second or subsequent policy on the same claim when recovery from the first policy alone would be inadequate.

In 2009, Ronald and Antoinette Belding renewed their auto insurance policies with State Farm Mutual Automobile Insurance Co. (State Farm). Each policy insured one of the Belding's vehicles, a Ford Ranger and a Mercury Villager, against liability for accidents that occurred in the six months after renewal. Each policy premium included a separate amount for uninsured motorist (UM) coverage.

In January of 2010, Ronald Belding was driving the Ford Ranger when he was struck by an uninsured vehicle driven by a drunk driver. Ronald suffered serious, permanent injuries. State Farm paid out $100,000, the per person limit for UM coverage under the Ranger policy. Because the Beldings suffered more than $100,000 in losses, they invoked the UM coverage under the Villager policy, seeking to stack it on top of the Ranger policy coverage.

State Farm denied coverage under the Villager policy based on its UM "drive other car" exclusion, which says there is no coverage. The Beldings argued the "drive other car" exclusion was invalidated by § 632.32(6)(d), which became effective Nov. 1, 2009. State Farm argued that the "drive other car" exclusion was expressly validated by the retention of § 632.32(5)(j) in the final enactment of the 2009 legislation.

The circuit court granted summary judgment in favor of State Farm, concluding that the "drive other car" exclusion in the Villager policy was authorized by § 632.32(5)(j) and precluded UM coverage for the accident. The circuit court reasoned that the legislature knew § 632.32(5)(j) was on the books when it enacted § 632.32(6)(d). The circuit court concluded sub. (5)(j) authorizes an exclusion that precludes coverage, while sub. (6)(d) prohibits anti-stacking clauses that limit the number of policies that do provide UM coverage to less than three. The circuit court also concluded that sub. (5)(j) is more specific to the validity of the policy's "drive

other car" exclusion than is sub. (6)(d) and the more specific statute controls if the two statutes cannot be reconciled.

The Beldings appealed, successfully arguing that the 2009 law prohibiting anti-stacking provisions and UM coverage, prevented the "drive other car" exclusion in the Villager policy from barring stacking. The Court of Appeals reasoned that neither the "drive other car" exclusion nor any other exclusion could stop the Beldings from stacking separate UM coverages they had purchased for their own vehicles.

State Farm asserts until the Court of Appeals' decision here, sub. (5)(e) was never used to prohibit an exclusion authorized by another subsection but rather consistently was applied to authorized exclusions not prohibited by some other statute.

The Wisconsin Insurance Alliance (the Alliance) joined by the Property Casualty Insurers Association of America filed a brief, contending that rather than performing the judicial function of interpreting and applying the law as written, the Court of Appeals "put on a legislative hat, added a provision to an unambiguous statute, and obliterated an important provision of the automobile insurance code."

WISCONSIN SUPREME COURT
WEDNESDAY, OCTOBER 23, 2013
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Dane County Circuit Court decision, Judge Daniel R. Moeser, presiding.

2011AP1572 Appling v. Walker (formerly Appling v. Doyle)

In this case, the Supreme Court interprets the meaning of a constitutional amendment ratified by voters. Specifically, the issue presented is whether Wis. Stat. ch. 770, the domestic partnership law, violates Art. XIII, § 13 of the Wisconsin Constitution.

The Court of Appeals concluded the legislation is constitutional. The Supreme Court previously denied a petition for leave to commence an original action (2009AP1860-OA) on Nov. 3, 2009 and later refused a Court of Appeals' certification on Sept. 17, 2012.

Some background: In November 2006, Wisconsin voters adopted a marriage amendment to the Wisconsin Constitution that provides:

"Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state." - Wis. Const. art. XIII, § 13.

In June 2009, the Wisconsin legislature "establish[ed] and provid[ed] the parameters for a legal status of domestic partnership" for same-sex couples in Wis. Stat. ch. 770. See 2009 Wis. Act 28, § 3218. Wisconsin Stat. ch. 770 contains eligibility requirements and prescribes the manner in which such partnerships are formed and terminated. The mechanism the Legislature chose for conferring rights and obligations was to select a subset of rights and obligations found in other parts of the statutes that already apply to marriages and then indicate, in the text of those other statutes, that they apply to domestic partnerships.

Julaine Appling and several others (collectively Appling) filed suit challenging the constitutionality of the domestic partnership legislation. Fair Wisconsin, Inc. and several individuals (collectively Fair Wisconsin) intervened as defendants. Appling and Fair Wisconsin both moved for summary judgment.

The state attorney general has declined to defend the statute, agreeing with Appling that Chapter 770 is unconstitutional. On Jan. 3, 2011, Gov. Scott Walker ceased the government's defense of the lawsuit on the grounds that Chapter 770 is unconstitutional. The statute was defended by the intervening defendants-respondents, Fair Wisconsin and other named intervenors.

On June 20, 2011, the circuit court concluded that Chapter 770 is constitutional because "the sum total of domestic partners' legal rights, duties, and liabilities is not identical or so essentially alike that it is virtually identical to the sum total of spouses' legal rights, duties, and liabilities." Appling appealed, and on Dec. 20, 2012, the Court of Appeals rendered a published decision affirming the circuit court's decision.

The Court of Appeals ruled that the same-sex domestic partnerships created by the Legislature are substantially different than marriages because, among other differences, domestic partnerships carry with them substantially fewer rights and obligations than those enjoyed by and imposed on married couples. The analysis focused on: (1) whether the eligibility requirements

for marriage and domestic partnerships are substantially similar, (2) whether the formation requirements for marriage and domestic partnerships are substantially similar, (3) whether the two entities enjoy the same rights and obligations, and (4) whether the termination procedures for domestic partnerships and marriages are substantially different. Without repeating the court's analysis and conclusions with respect to each factor, the Court of Appeals decided that "[t]he differences we have identified above, viewed collectively, show that the 'legal status' of a domestic partnership is not 'substantially similar' to the 'legal status' of marriage."

Appling maintains that the domestic partnership law violates the marriage amendment because the partnership law creates a "legal status" that is "substantially similar to that of marriage." She contends the term "legal status" is a reference to the eligibility and formation requirements for a marriage, but not to the rights and obligations incident to a marriage. The eligibility requirements to which Appling refers include things such as limitations based on age, ability to consent, and consanguinity. The formation requirements refer primarily to the process for obtaining a marriage license.

Appling does not contend that the marriage amendment is a blanket prohibition on domestic partnerships. Rather, Appling contends that the particular domestic partnership law at issue here is unconstitutional because the means it uses to identify eligible couples and formalize their relationships is too similar to the corresponding requirements of marriage. Appling asserts that the Supreme Court is limited to comparing the eligibility and formation requirements of marriages with the eligibility and formation requirements of domestic partnerships and then, based on this limited comparison, determining whether they are "substantially similar."

The parties also dispute the extent to which the court should consider advertising and statements made by proponents and opponents of the marriage amendment during the amendment adoption process.

Fair Wisconsin contends that voters understood the term "legal status" to more broadly refer to all legal aspects of marriages and domestic partnerships, including eligibility, formation, and termination requirements, along with the rights and obligations of such relationships.

Appling argues that persons who voted for the marriage amendment intended that the amendment preserve the "conjugal model" of marriage. Appling explains that the "conjugal model" is based on the premise that marriage is for sexual procreation and is "child-focused." The Court of Appeals agreed with the circuit court's statement that "there is no evidence that voters ratified the Marriage Amendment with the intent to further a conjugal model of marriage." A decision by the Supreme Court is expected to determine whether Wis. Stat. ch. 770, the domestic partnership law, violates Art. XIII, § 13 of the Wisconsin Constitution.